IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APEAL NO. 739 OF 2005

IN

SESSIONS CASE NO. 259 OF 2001

SHAHAJI RAMANNA NAIR ..APPELLANT

V/S

STATE OF MAHARASHTRA (CUFFE PARADE POLICE STATION) ..RESPONDENT

Mr. Sait, Advocate for the Appellant.

Mr. Adsule, APP for the Respondent.

CORAM : J.H. BHATIA, J.

DATE : 11TH JUNE 2007.

JUDGMENT

1. The present Appellant, who is original accused No. 1, preferred this Appeal for setting aside the order of conviction under section 393 and 398 of IPC and the sentence of R.I. for 7 years with fine of Rs. 2000/- for offence under sec. 393 IPC and R.I. for 7 years for offence under section 398 IPC passed by the 1st Ad-hoc Additional Sessions Judge, Greater Bombay in Sessions Case No. 259 of 2001.

2. The prosecution case in brief is that on 7th December 2000, P.W. 5 Rupchand Sharma, who was the driver of the Maruti Zen Car bearing No. MH 02 JA 9654 parked in front of NCPA Theatre, Vinay Shah Marg, near Bus Stop No. 108, was sitting inside the car and was taking his lunch at about 11.15 a.m. At that time, suddenly one person entered into the car and pointing out a knife to Rupchand Sharma directed him to start the car. Being frightened, he shouted and at that time another person gagged his mouth. Rupchand Sharma tried to rescue himself from the clutches of those persons and at that time the appellant caused injuries over his right hand thumb. One of them also took bite of Rupchand Sharma. As many people, particularly the hawkers, saw the incident, the said two culprits ran towards the sea-shore. At about the same time the police also came there in a police jeep and caught both the culprits. The accused No. 1, who was holding knife and accused No. 2, were arrested but later on accused No. 2 absconded. On the basis of the report lodged by Rupchand Sharma the offence came to be registered. He was also referred to the St. George Hospital for medical examination. Statements of several persons were recorded and after

investigation the charge sheet came to be filed. Vide

Exhibit 12 the charges came to be framed against the present appellant for offence punishable under sections 393, and 394 as well as sec. 398 of IPC. On behalf of the prosecution in all 8 witnesses came to be examined. The medical officer was not examined. Prosecution could not prove the injuries suffered by the P.W. 5. In the result after trial accused was acquitted for the charges under section 394 of IPC. However, he was convicted for the offence punishable under section 393 and section 398 IPC separately and was also sentenced on both the counts separately.

3. Heard Mr. Sait, Advocate appointed by the court to represent the accused/appellant who has preferred the Appeal through jail and Mr. Adsule, APP for the State. Perused the record and proceedings of the Trial Court.

4. Mr. Sait, learned counsel for the Appellant contended that there was no material to prove that the accused had attempted to commit robbery and that without any evidence in this respect, the accused has been convicted. He further contended that accused

could not have been convicted for the offences punishable under section 393 and as also under section 398 IPC separately. According to him prosecution has

utterly failed to prove that the accused had attempted to commit robbery and at that time he was armed with deadly weapon and therefore the conviction under section 393 as well as sec. 398 of IPC is not proper. Mr. Adsul tried to support the impugned judgment of conviction and sentence.

5. The prosecution has examined in all 8 witnesses. P.W. 1 Manoj Patel was the panch witness. P.W. 3 Ratan Rathod, P.W. 4 Balasaheb Godse, P.W. 6 ASI Mahadev Alande are the police officers, who claim to have reached the spot immediately after the incident. P.W. 7 API Mandar Dharmadhikari claims to have reached the spot after getting message from ASI Alande. P.W. 8 Prakashsing Bopari is the investigating officer who partly investigated the case.

6. The star witness of the prosecution is P.W. 5 Rupchand Sharma. He appears to be the only witness of the actual incident. His evidence reveals that at the

relevant time he was sitting in the car and was taking lunch. At that time one person came and gagged his mouth and another person assaulted with knife over his right hand finger and leg. He identified the

accused/appellant as the person, who was holding knife and who had assaulted. He deposed that later on said two persons tried to run away. However some people gathered and Police officers came there and both the culprits were nabbed and brought near the vehicle. Later on they were taken to police station. According to him he was referred to St. George Hospital. He deposed that he had lodged FIR. It is material to note that in his examination in chief he stated that the contents of the FIR were shown to him and he confirmed that the report Exh. 26 is the same and contents are correct. Before reading the FIR, he had not uttered a single word that any of the accused had made any attempt to commit theft or robbery. However, after the contents of the FIR were readover to him he deposed that at that time the accused wanted to commit theft of his car. It is material to note that even then he did not state anything as to what attempt was made by the accused person to commit theft of the car and on what basis he had come to the conclusion that they wanted to commit theft of his car. In the cross

examination he admitted that he was inside the car and the person, who had gagged his mouth was outside the car. He also admitted that no one had told him that

he should get out of the car. From this admission it becomes clear that none of the two persons had entered into the car, none of them had asked him to get out of the car and none of them had asked him to drive the car. In the FIR it was stated that one of them had entered into the car and pointed out the knife to him and asked him to drive the car, while another person had gagged his mouth. If the evidence of P.W. 5 Rupchand is to be taken at its face value, at the most it can be said that when he was sitting in the car, two persons came near the car and one person gagged his mouth and another person assaulted him with a knife and he sustained injuries. If this was the incident, it would be a simple case of voluntarily causing hurt with a sharp and cutting weapon, which is punishable under section 324 of IPC. If this evidence of Rupchand is considered, by no stretch of imagination it can be inferred that the accused persons had made any attempt to commit the offence of robbery or theft.

7. From the evidence of P.W. 5 Rupchand, it appears that when this incident occured some hawkers rushed to

the spot and seeing the rush of the people, the police party including P.W. 3 police constable Ratan Rathod and P.W. 6 ASI Mahadev Alande came there in a jeep P.W. 4 Balasaheb Godse was the driver of the police vehicle. Their evidence shows that they rushed towards the spot and got down from the vehicle. According to P.W. 3 Ratan Rathod, at the relevant time two persons stepped down from the Maruti car and proceeded towards sea-shore. Both of them were arrested by the police. According to him at that time one person came from the said Maruti car and shouted "chor chor". As per evidence of P.W. 4 Balasaheb Godse when the police party reached near the bus stop, he heard the noise like "chor chor" and thereafter they rushed towards the spot, the acused was possessing a knife. P.W. 4 claims to have taken the knife from the hands of the acccused. However, in his cross examination he admitted that in his statement before the police he had not stated that he heard

shouts "chor chor". P.W. 6 PSI Mahadev Alande also deposed that he had seen the people gathered near the spot and at that time some persons were running and people were shouting "chor chor". Immediately both the persons were nabbed.

8. P.W. 2 Bhairusingh, who is an eye witness, also deposed that some people had gathered and at that time the police vehicle came there and police arrested the accused persons. The people were shouting "chor chor". If the evidence of these witnesses is to be believed, it appears that all of them heard the people shouting "chor chor". But there is not a single witness, who speaks about the actual incident. As earlier pointed out, Rupchand had not deposed anything about robbery or theft before FIR was readover to him, on the basis of which, it could be said that attempt to commit theft was committed. This does not go to prove the offence of theft or robbery.

9. P.W. 7 Mandar Dharmadhikari deposed that he came to the spot after getting the telephone message from ASI Alande and found that two persons were arrested. He went to the spot alongwith his staff. He referred

the injured person to the St. George Hospital. He recorded the statement of Rupchand and referred it to the police station for registration of the FIR.

10. Taking into consideration whole of the evidence, at the most it could be said that the present Appellant had assaulted Rupchand by knife. The trial court acquitted him for the offence punishable under section 394 IPC on the ground that the prosecution has failed to prove that Rupchand had suffered any injury because the medical officer was not examined. In view of this, what is proved against the accused is that he was armed with a knife and that he had assaulted Rupchand. Nothing more is proved against him. In view of the evidence discussed above prosecution has utterly failed to prove that the accused had attempted to commit theft or robbery at the point of knife. In view of this the accused could not be convicted for the offence of attempt to commit robbery punishable under section 393 or under section 393 read with sec. 398 of IPC. The learned Trial court has failed to scrutinise and appreciate the evidence and appears to

have been swayed away by somany witnesses deposing that they had heard the people shouting "chor chor". In view of this the impugned judgment of conviction and sentence cannot be sustained.

11. Section 393 and 398 of IPC reads as follows:

"Sec. 393:- Attempt to commit robbery - Whoeveer attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine."

"Sec. 398:- Attempt to commit robbery or dacoity when armed with deadly weapon - If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years."

12. From the language of both the above sections it becomes clear that for the offence of attempt to commit robbery the maximum punishment prescribed by law is rigorous imprisonment for seven years with

fine. However the discretion is left to the court to quantify the actual sentence to be awarded. However, if at the time of attempting to commit robbery the offender is armed with any deadly weapon, the offence becomes more serious or aggravated and therefore section 398 provides that in such circumstances the imprisonment with which, the offender shall be punishable, shall not be less than seven years. If at the time of committing robbery the offender is not

armed with any deadly weapon the court may award sentence of imprisonment for a term upto seven years and if he was armed with deadly weapon the sentence of imprisonment shall not be less than seven years. In such circumstances the maximum sentence of rigorous imprisonment of seven years has to be awarded. It is well settled that Sec. 398 IPC does not create any offence but merely regulates the punishment already provided for robbery or dacoity. One cannot be convicted and sentenced separately under section 393 and section 398 of IPC. The learned trial court has committed error in passing separate order of conviction and sentence under section 393 and 398 of IPC. In such cases if it is proved that the accused was armed with deadly weapon at the time of attempt

to commit robbery, he may be convicted under sec. 393 r/w. 398 IPC.

13. In view of the evidence discussed above as well as the circumstances, I find that the trial court committed error in passing the impugned order of conviction and sentence under section 393 and 398 of IPC and therefore the Appeal deserves to be allowed.

14. In the result, the Appeal is allowed.

The impugned judgment and order of conviction and sentence are set aside.

The Accused/Appellant is acquitted of the charges under section 393 and 398 of IPC and he be set at liberty forthwith, if not required in any other case.

(J.H. BHATIA, J.)